Supreme Court of the United States,

OCTOBER TERM, 1912. No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders, etc.,

Appellants,

against

SOUTHERN PACIFIC COMPANY, *et al.*,

Appellees.

APPELLANTS' BRIEF.

JAMES A. O'GORMAN,
A. J. DITTENHOEFER,
H. SNOWDEN MARSHALL,
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Counsel for Appellants.

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Law Points.

The Cases.

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Statement.

The original appellant in this case, Walter B. Lawrence, died pending the appeal, and his executors, Henry L. Bogart, Townsend Lawrence and Anita Lawrence, were substituted in his place as appellants on the first day of April, 1912.

This is an appeal from a final decree of the United States Circuit Court for the Eastern District of New York dismissing the bill of the complainant (pp. 80-81).

The Judge who signed the decree certified that a question of jurisdiction of the Circuit Court was

decided adversely to the complainant and that by reason thereof, and not otherwise the final decree was entered (pp. 81-82).

The suit was commenced in the New York Supreme Court for the County of Queens, and was thereafter removed by certain of the defendants to the Federal Court (p. 35). Two motions to remand were made by complainant and denied; the defendants then interposed pleas to which replication was filed by the complainant, and the pleas were heard on an agreed statement of facts (p. 66). The decree dismissing the bill resulted from the decision upon these pleas in favor of the defendants and against the complainant (pp. 70-79).

The defendant's position in the last analysis is that, assuming the plaintiffs to have a perfect cause of action, there is no court to which they may submit their grievance for determination. If they start proceeding in a state court which has jurisdiction of all the parties the defendant contends it may be removed into the Federal court only for the purpose of dismissing the bill, as was done at bar; and if the suit should be commenced in the Federal court the same result will follow. So that the contention is made for the first time that stockholders of a corporation, having justifiable cause for complaint, can find no court in which they may have a hearing on the merits.

Specification of Errors.

The Court erred in sustaining the pleas of the defendants and holding that the Houston & Texas Central Railway Company was an indispensable party.

(Assignment of Errors 1, 2 and 5, p. 83.)

The Court erred in dismissing the cause, whereas it should have remanded it to the State court after it determined the Railway Company was an indispensable party.

(Assignment of Errors 3 and 4, p. 83.)

The Bill of Complaint.

The complainant brought suit on behalf of himself and of all of the other stockholders of the Houston & Texas Central Railway Company (p. 12).

The defendants named were the Southern Pacific Company, Frederick P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company.

All of these defendants appeared in the action with the exception of the last-named defendant, the Houston & Texas Central Railway Company, and it was owing to the fact that this defendant was not served and did not appear that the court held itself to be without jurisdiction to proceed with the action and dismissed the bill (p. 81).

The bill of complaint in substance alleges that the complainant was a stockholder of the Houston & Texas Central Railway Co. owning stock of the par value of $10,000 at all the times of the grievances of which he complained (pp. 1-2); that the defendant the Southern Pacific Company was the owner of the majority of the stock of the said Houston & Texas Central Railway Company (p. 2); that the

Railway Company became involved in various difficulties and litigations (pp. 3-6); that suits were brought against the Railway Company to foreclose various mortgages which the Railway Company had placed upon its property, all of which suits were in May, 1886, consolidated into one case in the Circuit Court of the United States for the Eastern District of Texas (p. 6). It is alleged that in said suit then pending the Railway Company had interposed to the suits to foreclose its mortgages good and valid defenses on the ground that the mortgages were not due (p. 6), and that these defenses were never litigated, and the interposition of said defenses prevented the foreclosure of any mortgage upon the property (p. 6).

It is further alleged that thereafter the defendant the Southern Pacific Company, which was the majority shareholder of the Railway Company, entered into negotiations with the holders of bonds under the mortgages which the company had issued, which negotiations resulted finally in the formation and execution of a reorganization agreement, a copy of which is annexed to the bill (p. 7). By the terms of this agreement it was provided that all existing mortgages should be foreclosed (p. 14); that new mortgages should be placed upon the property, and the new bonds should be distributed to the holders of the bonds secured by the old mortgages. A new company was to be organized to acquire the property (p. 14), and the capital stock of this company was to be distributed in a way that offered better terms to the Southern Pacific Company, the majority shareholder of the Railway Company, than were offered to the com-

plainant and the other minority shareholders of that company (p. 7 and p. 17).

This reorganization agreement was carried out practically according to its terms (pp. 7-8). The Southern Pacific Company procured the carrying out of the reorganization agreement and the withdrawal of all the defenses in the pending suits, which had theretofore been interposed by the Railway Company; in consequence of this withdrawal of defenses there was a foreclosure sale on May 4, 1888, and a new company was organized and acquired the Railway Company's property, and executed the new mortgages called for by the reorganization agreement, and distributed the new bonds to the bondholders pursuant to the terms of the reorganization agreement (p. 8).

Certain large land grants held by the Railway Company were not acquired by the new Railroad Company, but were disposed of through trust indentures as additional security for the new mortgages, substantially along the lines provided in the reorganization agreement. The details of that disposition are not important for the present statement.

Stock in the new company was offered to the complainant and other minority shareholders on prohibitive terms (p. 9), and none of the minority shareholders of the old company complied with the terms or took the stock. All of the said stock was taken over by the Southern Pacific Company, the majority shareholder of the old company, on the favorable terms which had been provided for it in the reorganization agreement to which it had been a party. The stock was and is of great value, and the Southern Pacific Company has made great

profit by its ownership and control of the stock (p. 9). The Southern Pacific Company acquired the said stock, which was of the par value of $10,000,000, through and by means of its ownership and control of a majority of the stock of the old Railway Company and because it caused the Railway Company through its control of that company to withdraw the defenses to the suits which it had brought against the Railway Company, and to give consent to the foreclosure decree and to the carrying out of the reorganization agreement (p. 9).

The acquisition of the said stock by the Southern Pacific Company was in consideration of the performance by the Railway Company of corporate acts and the withdrawal by the Railway Company of the defenses which had been interposed for the benefit of the Railway Company and all its stockholders. The delivery of the whole stock of the new company to the Southern Pacific Company was a part of and in consideration of a composition between the old Railway Company and its mortgage creditors set out and described in said reorganization agreement. The mortgage creditors of the old Railway Company, pursuant to this composition in the reorganization agreement, permitted the Southern Pacific Company to take the whole capital stock of the new company in consideration of the withdrawal by the old company of defenses which prevented the foreclosure of the mortgages (pp. 9-10).

The relief demanded by the complainant was, among other things, that it be adjudged and decreed that the Southern Pacific Company acquired the said stock and all the profits and earnings received upon it as trustee for the complainant and

other minority stockholders who may come in and contribute to the expenses of this litigation in accordance with the respective rights of the parties to be adjusted by the court (p. 12).

The substance of the grievances alleged by the complainant is that he was a minority shareholder in a company of which the Southern Pacific Company was the majority shareholder; that this majority shareholder, when the Railway Company got in difficulties, made a composition with the creditors of the Railway Company one of the terms of which was that the Southern Pacific Company should get all of the equity in the reorganized property; that what the Southern Pacific Company gave in this composition to the mortgage creditors of the Railway Company was the withdrawal of defenses to the suits pending against the company; that the majority shareholder had no right to take the whole benefit of this composition to the exclusion of the minority shareholders; and that such a state of facts required that a trust be impressed on the stock which the Southern Pacific Company acquired through this proceeding for the protection of the rights of the complainant and others similarly situated.

Other details concerning the complaint will be referred to in the ensuing argument.

Proceedings in the Suit Below.

The defendants Southern Pacific Company, Frederick P. Olcott and the Houston & Texas Central Railroad Company (the new company), all being non-residents of New York, removed the cause into the United States Circuit Court for the Eastern District of New York (pp. 30-36), where the com-

plainant made a motion to remand (p. 36), which was denied (p. 41), the Court writing an opinion upon the denial of the motion (pp. 37-40). Thereupon the defendants Central Trust Company of New York, Farmers' Loan & Trust Company and Metropolitan Trust Company respectively appeared (pp. 41-42).

The defendants Southern Pacific Company, Frederick P. Olcott and Houston & Texas Central Railroad Company thereupon filed a plea claiming that the Houston & Texas Central Railway Company was a proper, necessary and indispensable party to the suit; that said Railway Company has not been and cannot be brought by process within the jurisdiction of the court, and that without the presence of the said company no complete or final justice can be done or decreed; and prayed that the bill be dismissed (pp. 42-43). A similar plea was filed by the Central Trust Company of New York (p. 44), and by the Farmers' Loan & Trust Company of New York (p. 46), and by the Metropolitan Trust Company of New York (p. 47).

To this plea the complainant filed replications (pp. 49-52). Thereafter, in view of the nature of the pleas interposed by the defendants, the complainant filed another motion for leave to renew its motion to remand and for a remanding of the case upon the ground that it had been removed into the Circuit Court, which could not get jurisdiction of the Railway Company, from the Supreme Court of the State of New York, which could acquire jurisdiction over all of the defendants (pp. 52-53). This motion was supported by an affidavit of the complainant showing that in the State Court where the action was originally brought, jurisdic-

tion could be obtained over all the defendants (pp. 54-56).

The motion was denied by the Circuit Court (p. 57).

Thereafter the defendant Frederick P. Olcott died (April 15, 1909), and the defendants moved that the suit be dismissed because he was an indispensable party and his executors were appointed in New Jersey and could not be brought into the action by the service of process (pp. 57-60).

Judge CHATFIELD wrote an opinion on this motion (pp. 61-65), and denied it (pp. 65-66).

The parties then filed an agreed statement of facts upon which to submit the pleas theretofore interposed by the various defendants (pp. 66-70). It appeared in this statement of facts that the Railway Company, whose absence from the jurisdiction was the basis of the pleas, had been incorporated under a special act of the Texas Legislature in 1848 (p. 66); that it had incurred various indebtedness and gotten into various difficulties (p. 66); that the foreclosure in May, 1888, had taken place (p. 67); that its property had been sold under the foreclosure (pp. 67-68); that the reorganization agreement had been carried out and a new company organized (p. 68); that mortgages pursuant to the reorganization agreement had been executed (p. 68). It was further stipulated that nine named persons had been elected as directors in 1885, at the last election held by the Railway Company (p. 69); that three of these were living (p. 69). It was stipulated that all of the properties and franchises of the old Railway Company were sold under the foreclosure decree for a sum seven million dollars less than the amount decreed to be due, and

that this deficiency has remained unpaid and is uncollectible (p. 69).

It was further stipulated that since the sale of the property under the foreclosure in 1888 the company has owned no property in any State, has transacted no business, has had no place of business in the State of New York, and that none of the three surviving directors ever come to New York upon the business of the company; that no meetings of the stockholders of the Railway Company have been held since the day of the foreclosure, and no meeting of the directors has been held since June, 1890 (p. 69).

The pleas having been submitted to the court on this statement of facts, Judge CHATFIELD wrote an opinion (pp. 70-79), holding in favor of the defendants, and upon said opinion ordered (p. 80) that unless service was effected upon the old Railway Company within five days from September 14, 1910, a final decree should be entered dismissing the bill; and thereafter and on September 23, 1910, the old Railway Company not having been served, he entered a final decree dismissing the bill (pp. 80-81), and made his certificate that the jurisdiction of the court was in issue (p. 81).

For the Federal courts to dismiss the suit on the ground that they have no jurisdiction, and at the same time to refuse to send it back to the State court, which concededly has jurisdiction, leads to the unconscionable result that the complainant with a good cause of action, is by judicial decree turned out of every forum, not on the merits, but on a bald technicality, and left remediless, subverting the maxim that there can be no wrong without a remedy.

POINT I.

The Circuit Court had jurisdiction to proceed with the case in spite of the fact that the old railway company was not brought before the court by service of process or voluntary appearance.

The view taken by the Circuit court was that in a suit brought by a minority stockholder for the benefit of himself and all other stockholders the corporation is an indispensable party.

Many cases can be cited to support this proposition as a general proposition, but the rule is not inflexible. In a great many cases where the facts were like those in the case at bar it has been held that the corporation is not an indispensable party.

Kidd v. New Hampshire Traction Co., 72 N. H. 273;

Fletcher v. Newark Telephone Co., 55 N. J. Eq. 47;

Crumlish v. Shenandoah Valley Rd. Co., 28 W. Va. 623;

In the present case the relief which the minority stockholders are asking is of a character which does not necessarily require the presence of the old railroad company. The minority shareholders say, in effect, that the majority shareholder obtained for itself profits for which it gave as consideration the surrender of defenses to suits brought against the corporation. The plaintiffs claim, in effect, that what was derived by the withdrawal of cor-

porate defenses was taken by the majority shareholder as trustee for all of the shareholders, and could not be taken by that majority shareholder for itself alone (p. 12).

Further, from the stipulated facts it appears that the old corporation was dead in everything but name; that it had held no meetings and transacted no business since 1888 (p. 69); and that it was buried under a debt that was unpaid and uncollectible (p. 69).

The present suit falls rather under the rule laid down by Judge MARTIN in the case of *Kuchler* v. *Greene*, 163 Fed. Rep. 91, and by Judge WALLACE in *Irvin* v. *Oregon R. & N. Co.*, 20 Fed. 577. The old corporation was undoubtedly a proper party, but was not indispensable.

Section 737 of the United States Revised Statutes provides:

> "When there are several defendants in any suit at law or in equity. and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the Court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-rejoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 provides:

> "In all cases where it shall appear to the Court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their

> being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

The court below was of opinion that in spite of the provision of law and the equity rule above quoted, he was without jurisdiction to proceed with the case. In this we submit he was clearly in error. The case was one in which the old railroad company was a proper party—in which, in the language of the equity rule above quoted, the old railroad company "might otherwise be deemed a necessary or proper party." But the object of the provisions of law above quoted and of the rule was to confer jurisdiction upon the United States Circuit Court in just such a case as the present one, and the decision of the court adverse to this contention was erroneous.

Rogers v. Penobscot Mining Co., 154 Fed. Rep. 606.
Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 82 Fed. 124.
Kuchler v. Greene, 163 Fed. Rep. 91.
Irvin v. Oregon Railway & Nav. Co., 20 Fed. 577.
Slater Trust Co. v. Randolph-Macon Coal Co., 166 Fed. 171.
Payne v. Hook, 7 Wall. 425.
Barney v. Baltimore, 6 Wall. 280.
Elmendorf v. Taylor, 10 Wheat. 167.
Anthony v. Campbell, 112 Fed. 212.

Wellman v. Howland Coal & Iron Works, 19 Fed. 51.
North Carolina Mining Co. v. Westfeldt, 151 Fed. 290.
Fletcher v. Newark Tel. Co., 55 N. J. Eq. 47.
Hunter v. Robbins, 117 Fed. 920.
Conery v. Sweeney, 81 Fed. 14.
Union Mill Co. v. Danberg, 81 Fed. 73.
Newton v. Gage, 155 Fed. 598.
Howe v. Howe, etc., Co., 154 Fed. 820.
Watson v. Nat. Life & T. Co., 162 Fed. 7.
Traders Bank v. Campbell, 81 U. S. 87.
Fisher v. Schropshire, 147 U. S. 133.

In some of the cases above cited the Federal courts have held that they had jurisdiction to proceed with the cause in spite of the absence of a defendant whose position was nearly analogous to that occupied in the present case by the old Houston & Texas Central Railway Co.

The cases relied upon by the defendants below were all cases where a minority stockholder of *a going* concern sued for relief in behalf of his company, such as *Redfield* v. *Baltimore & Ohio Railroad Co.,* 124 Fed. Rep. 929, where the court expressly said:

> "If the corporate entity had become extinct a different situation would present itself; but the plaintiff is evidently of the opinion that the old Staten Island Company *is still vigorous and hearty,* and I see no reason to take a different view of the matter."

We do not believe that there is any case where the Federal Court has decided that it was power-

less to proceed with a case on account of want of jurisdiction due to the absence of a defendant who was as little concerned with the outcome of the case as is the old railway company in this case.

Judge Wallace said in the case of Irvin v. Oregon Rwy. & Nav. Co., 20 Fed. 577, at page 581:

> "There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside the corporation would be only a dry trustee for the purpose of dividing the property among the beneficial owners."
>
> * * * * * * *
>
> "Although the corporation may not be effectually extinguished as against creditors, there is no difficulty in concluding that it is so far extinct that it cannot stand in the way of the enforcement by its former stockholders of their equitable rights to a fair accounting from those who have assumed to distribute its assets."

The Supreme Court of the United States, in Payne vs. Hook, 7 Wall. 425 at p. 431, said:

> "The necessity for the relaxation of the rule is more especially apparent in the Courts of the United States, where, oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. (West v. Randall, 2 Mass. 181; Story Eq. Pl., Sec. 80 *et seq.*)"

The Court said, in Elmendorf vs. Taylor, 10 Wheaton, 167:

> "In the exercise of its discretion, the court will require the plaintiff to do all in his power

> to bring every person concerned in interest before the court. But, if the case may be completely decided as between litigant parties, the circumstances that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

In Wellman v. Howland Coal & Iron Works, 19 Fed. 51, the Court said:

> "* * * The corporation still had a legal existence, but not an actual one. * * * While, therefore, this corporation is not defunct, it has no living, active existence, although in law it may survive sufficiently to have the power of reorganization for some purposes. Its present status makes the reasons which apply to a defunct corporation apply to this one. * * * The motion to remand to a state court is overruled."

The Twenty-fifth Equity Rule promulgated by the United States Supreme Court last November, which goes into effect February 1, 1913, provides that:

> "Fourth. If there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction."

It is to be noted that in the State court where this case was originally brought the provisions of the State statutes regarding service of non-

residents were such that service by publication could have been had upon the old railway company and thus all of the parties could have been brought before the court. (§438, Code Civil Pro.)

Grant v. Greene Cons. Co., 59 Misc. 1 (affirmed 193 N. Y. 306).
Pope v. Terra Haute Car & Mfg. Co., 87 N. Y. 137.
Grant v. Cananea Co., 189 N. Y. 241.

The Court below frankly conceded the effect of his action. He pointed out that the interpretation which he was giving to the Acts of Congress was not to give the Federal courts jurisdiction of a removed cause for the sake of hearing and determining that cause, but was giving it jurisdiction to be availed of by the defendants so as to take the plaintiff from a forum where his case could be heard and compel him to litigate in a forum where his case could not be heard and from which he could not escape with the possibility of bringing his action in any other court (p. 77).

The reasoning of the Court below is one which confers a very dangerous power upon the Federal court—and it is submitted that it was to avoid this very danger that section 737 of the Revised Statutes was enacted, and that Equity Rule 47 was promulgated. Here some of the defendants have, as the judge below concedes, removed a case from a court where it could be tried with all parties present into a court in which one of the parties could not be served with process. The object of the removal was not to try the case, but to kill it on a technicality. The court, apparently conceding that this was the object of the defendants, in-

terprets the Federal statutes so strongly against his own jurisdiction that he concludes that he is bound to sustain the point taken by the defendants.

It is submitted that this decision is supported by no precedent and is contrary to the plain language of the statute and the rule of the court, and that the court below had jurisdiction to try the issue presented by the bill of complaint, whether the old railway company was made a party or not.

POINT II.

If it be held that the Circuit Court had no jurisdiction to proceed with the case in the absence of the old railway company, the Court had no jurisdiction to decree a dismissal of the bill, but was bound to remand the cause to the State Court.

If the court had been right in its view that the old railway company was an indispensable party, the conclusion should have followed that the case should be remanded to the State court, where it could be tried, and not that the Federal court should sustain the plea and dismiss the bill.

Cates v. Allen, 149 U. S. 451.
Northern Pacific Co. v. Lowenberg, 18 Fed. Rep. 339.
Davis v. Gray, 16 Wall. 223.
Pollard v. Dwight, 4 Cranch. 421.
Gombert v. Lyon, 80 Fed. 305.

Purdy v. Wallace Muller & Co., 81 Fed. 513.
Wells v. Clark, 136 Fed. 462.
Tootle v. Coleman, 107 Fed. 44.
Stowe v. Santa Fe Railroad Co., 117 Fed. 368.
Richmond v. Brookings, 48 Fed. 241.
Cowley v. Northern Pacific R. Co., 159 U. S. 569.
Courtney v. Pradt, 196 U. S. 89.
Postal Co. v. So. Ry. Co., 122 Fed. 156.
Peters v. Equitable Life Ins. Soc., 149 Fed. Rep. 290.
Stockton v. Oregon, 170 Fed. 627.
Johnson v. Computing Scale Co., 139 Fed. 339.

There are instances where a cause was removed from a State court which had, or could have secured jurisdiction over the defendant, *and the question of service upon that defendant raised in the Federal court*, as in the well-known case of Goldey v. Morning News Co., but in no case did the court refuse to remand the cause under circumstances similar to those at bar, and lay down the doctrine that a removal may be had *only to aid a defendant in escaping all liability to account for his misconduct before any forum.*

The Removal Act was intended to further justice not to obstruct and defeat it. Its purpose was to permit a defendant to secure the benefit of a trial in a court where there was no danger because of local prejudice, or question of his securing full and complete justice, but no one has yet successfully contended that the effect of the Removal Act

was to aid in obstructing and defeating a trial before *any* tribunal.

Section 5, of the Act of March 3rd, 1875, provides:

> "If in any suit commenced in a Circuit Court or removed from a State Court to a Circuit Court * * * it shall appear to the satisfaction of such Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such Circuit Court * * * the said Circuit Court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

1 Rose's Code Federal Procedure, §818, p. 753, says:

> "These words are not used interchangeably, but 'dismiss' applies to suits brought in the Circuit Court, and 'remand' to suits removed thereto."

In Northern Pacific Co. v. Lowenberg, 18 Fed. 339, the court said, at page 341:

> "* * * The words 'dismiss' and 'remand' are not used interchangeably or indiscriminately in Section 5 of the Act of 1875 (18 St. 472). The former has reference only to a suit brought in the Circuit Court, and the latter to one removed there from the State Court. In the one case, if it appears that the suit is not cognizable in the Circuit Court, it is dismissed, and in the other it is remanded to the State Court."

In Cates vs. Allen, 149 U. S. 451, the court said:

> "But it is not to be concluded where adverse citizenship might enable the parties to

remove a case but for the objection arising from the nature of the controversy, that, if such removal has been had, the suit must be dismissed on the ground of want of jurisdiction. *On the contrary, we are of the opinion that it is the duty of the Circuit Court under such circumstances to remand the cause.*" (Italics ours.)

In Wells vs. Clark, 136 Fed. 462, the court held:

> *"The removal statute cannot be construed as to permit a defendant to oust the original jurisdiction of a State Court by removal, and then obtain a dismissal of the action in a Federal Court for want of jurisdiction."* (Italics ours.)

The court saying at page 466:

> "Where a petitioner relies solely upon a diversity of citizenship for removal, any construction which will allow a suit to be removed solely for the purpose of dismissing it, would not be sound."

The following are the five cases cited in respondent's brief below, and relied upon by the trial Judge to sustain his position in dismissing the case for lack of jurisdiction, and not remanding it to the State court where jurisdiction could be obtained of all the parties:

Goldey v. Morning News, 156 U. S. 518.

Conley v. Mathieson Alkali Works, 190 U. S. 406.

Craig v. Welch Motor Car Co., 156 Fed. 554.

Peterson v. Chicago, Rock Island & Pac. R. R. Co., 205 U. S. 364.

Kendall v. American Automatic Loom Co., 198 U. S. 477.

The cases of Goldey v. Morning News, Conley v. Matheson Alkali Works and Craig v. Welch Motor Car Co. were motions to set aside the service of a summons against the defendant, after the case had been removed into the Circuit Court, and the cases of Peterson v. Chicago, Rock Island & Pacific R. R. Co. and Kendall v. American Automatic Loom Co., were originally commenced in the Circuit Court. The Peterson case was dismissed for lack of proper service on the defendant, and in the Kendall case service of the summons was set aside.

In none of these cases could the case have been remanded; the last two originated in the Circuit Court, and the first three were motions to set aside service of a summons so there was nothing to remand after the motions were granted.

These cases are, therefore, entirely different from that at bar, where the State court had and could obtain jurisdiction of all the necessary parties, and the Circuit Court, after the removal, had jurisdiction of all the necessary parties, except that it is claimed the defendant Railway Company was also a necessary party, and the case was dismissed for lack of jurisdiction of the Federal court, because of the absence of the said Railway Company.

POINT III.

The jurisdiction of the court was in issue in the Circuit Court, so that the appeal was properly taken directly to this court.

In view of the certificate of the court below and the plain facts in the case, it would seem to be unnecessary to argue this question at length.

The court below construed, adversely to its jurisdiction a Federal statute passed manifestly for the purpose of extending the jurisdiction of the Federal courts. The court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand and dismiss a case which could be tried in the State court. A more important question of jurisdiction than is involved in this last proposition could hardly be stated.

The final decree recites that the bill is dismissed "on the ground that the court has not jurisdiction to proceed further with the cause, for the reason that the Houston & Texas Central Railway Company is an indispensable party. * * *" (pp. 80-81). The certificate recites that the court "certifies to the Supreme Court of the United States that *in the above-entitled cause the jurisdiction of this court to proceed with the same was in issue,* and was decided adversely to the plaintiff, *and that by reason thereof and not otherwise* the order and decree of the 14th day of September, 1910, and the final decree of September 23, 1910, shown in the record herein, were entered" (p. 81). The order allowing the appeal recites that it is allowed "upon the ques-

tion of jurisdiction of this Court over the cause of action" (p. 86).

The above recitals by the court below that the case was decided on jurisdictional grounds should be controlling.

In re Lehigh Mining & Mfg. Co., 156 U. S. 322.

Scully v. Bird, 209 U. S. 481.

As the court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this Court.

Section 5 of Act of March 3, 1891 (26 St. L. 827).

Chicago Board of Trade v. Hammond Elevator Co., 198 U. S. 424.

Sheppard v. Adams, 168 U. S. 618.

Kendall v. San Juan Mining Co., 144 U. S. 658.

Nashua Railway Co. v. B. & L. Railway, 136 U. S. 336.

THE DECREE DISMISSING THE BILL OF COMPLAINT SHOULD BE REVERSED, AND THE CASE SENT BACK TO THE COURT BELOW FOR TRIAL, IF THIS COURT CONCLUDES THE TRIAL COURT HAD JURISDICTION, OR LACKING JURISDICTION, THE COURT BELOW SHOULD BE INSTRUCTED TO REMAND THE CASE TO THE STATE COURT FROM WHENCE IT WAS REMOVED.

Respectfully submitted,

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Supreme Court of the United States.

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Supreme Court of the United States.

OCTOBER TERM, 1912. No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders,

Appellants,

AGAINST

SOUTHERN PACIFIC COMPANY *et als.*,

Appellees.

APPELLANTS' REPLY BRIEF.

The argument of our adversaries that the old Railway Company is an indispensable party is based on a complete misconception of the nature of this case and of the relief to which the minority share holders are entitled.

We concede the correctness of the statement in Mr. VAN BRUNT'S brief that there has been a great deal of litigation in this case preceding the present suit. This litigation may be divided into two classes: All of the cases preceding the case of *McArdell* v. *Olcott* (189 N. Y., 368), were suits in which some effort was made to enjoin or rip up or

destroy the reorganization and affect the status of the new security holders who had taken their securities under the reorganization plan. Each of these cases failed for various reasons not affecting the merits of the present controversy in any way at all. A great number of technical questions were decided in one way or another, but the merits of the case were never decided by any judge in any of these cases.

In the *McArdell* case the plaintiff attempted to assert the same claim that is asserted in the present case. It was held by the Court of Appeals of New York, however, that he could not maintain this position because in his bill and on the trial below he had charged fraud. It was held that he could not on appeal claim that a trust should be impressed upon the profits realized by the Southern Pacific Company for the reason that upon the trial below the case had been put upon a different theory.

In the *McArdell* case, however, two judges dissented, and these two judges are the only two of all the judges who have considered this bewildering mass of litigation who have ever passed upon the merits of the controversy. Judge EDWARD T. BARTLETT, with whom concurred Judge VANN, of the New York Court of Appeals, were both of the opinion that the plaintiff had a good cause of action, and that the majority of the court were wrong in holding that he was estopped from asserting it by reason of the theory on which the case had been tried below.

That case having been thus decided, the present suit was brought, and the theory on which the case stands is a simple and clear one. The theory of the minority shareholders is, as stated by Judge BARTLETT in his dissenting opinion in *McArdell* v. *Olcott* (189 N. Y., 368, at p. 392):

> "The present position of the plaintiffs is not inconsistent with the finding of the trial court that the purchasers at the foreclosure sale acquired a good title. The Southern Pacific

> Company, the majority stockholder of the old company, received the entire issue, $10,000,000 stock of the new company, and plaintiffs seek after a full accounting and adjustment of mutual rights between it and them to impress a trust on the net property of the old company for the benefit of minority stockholders."

The case of *McArdell* v. *Olcott* was argued on behalf of the minority shareholders in the Court of Appeals of New York by the late EDWARD M. SHEPARD, and from his brief we quote as follows:

> "Granting that one corporation controlling another, which undertakes to manage the affairs of that other, and to make contracts for the other corporation, assumes a trust relation to the stockholders of the controlled corporation, the consequences which we have here asserted must follow.
>
> "We take it that in asserting that the controlling corporation occupies towards the stockholders of the controlled corporation the same fiduciary position occupied to those stockholders by the directors, or the corporation itself, this Court meant to assert that all of the ordinary consequences attending the trust relation applied to such a situation as this.
>
> "If the directors of the Houston and Texas Central Railway Company after reorganization had appeared in possession of the whole equity in the property conceded to the Houston and Texas Central Railway Company in a settlement with the creditors, the position would be precisely the same as is presented where the majority stockholder appears after the settlement in possession of that equity.
>
> "We concede that, as the case appears in this court, it must be assumed that all allegations in the complaint of actual fraud are unproved except so far as the existence of fraud follows as a necessary conclusion of law from the undisputed facts.
>
> "Does the plaintiff in this action have to sustain the burden of showing actual fraud?
>
> "The ordinary rule bearing on this sub-

ject is thus stated in Pomeroy's Equity Jurisprudence, Section 1077, where the writer speaks of the duty of the trustee or agent not to accept any inconsistent position, or enter into any relation, or do any act inconsistent with the interests of the beneficiary. It is said:

"'The most important phase of this rule is that which forbids the trustees and all other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates *irrespectively of the good faith or bad faith of such dealing.*'

"It is pointed out in the text of this writer, on the authority of numerous cases, that when the party occupying the fiduciary relation is found to have made personal profit from transactions of any character whatsoever involving the trust property, there arises at once, by operation of law in the *cestui que trust* the right,

"(*a*) If no other rights have intervened, to set the transaction aside;

(*b*) If other rights have intervened, to have a trust impressed upon all proceeds realized by the trustee or fiduciary out of dealings with the trust property.

"To such a claim it is held in innumerable cases that it is no defense for the fiduciary to show absolute good faith; it is no defense to show the acquisition of the trust property at a judicial sale; it is no defense to show that the sale was open, and that the price realized and paid for the trust property was fair and adequate.

"We earnestly submit that, if the doctrine which makes the majority stockholder, or the corporation controlling the majority of the stock, a trustee in respect to the corporate property, is not to be rendered wholly nugatory, this same ordinary principle of the law of trusts must apply to a trustee of this description."

In the present case, before the foreclosure and reorganization of the old Company, the Southern

Pacific Company, which was the majority shareholder of the old Company, controlled less than four-sevenths of the stock which represented the equity in the old railroad. It controlled some $4,000,000. par value of stock out of a total issue of $7,726,900. (p. 2). After the reorganization the Southern Pacific Company turned up in possession of the whole equity of the reorganized company. It accomplished this result by making a bargain for its own benefit through the reorganization agreement and securing for itself in that reorganization agreement the whole of the equity of which it had theretofore held less than four-sevenths.

Supposing, now, that when this case comes to a trial its merits will at last be passed upon, and supposing that the judge who decides the case comes to formulate a decree, what can he do? This is the test by which we ask the court to decide whether the old company is or is not an indispensable party.

We submit that the decree would provide that, in dealing with the Texas litigation, and making a compromise of it through its control of the old company, the majority shareholder was a trustee for all the shareholders of the old company; that as such trustee the Southern Pacific Company was bound to share, on equal terms, with its fellow-shareholders all that it realized out of that reorganization; that it should account for all profits that it had made, and that it should be credited with all expenses that it had incurred, and that the balance shown on this accounting should be divided between the Southern Pacific Company and the minority shareholders in the proportion of their holdings in the old corporation.

If we are right in claiming that this is the relief which a judge would give if he agreed with Judges BARTLETT and VANN of the New York Court of Appeals, it is perfectly plain that the old company is not an indispensable party, and that full relief can be given in this suit without any more parties before the court than have now appeared in the suit.

We may be asked, then, why the old company was made a party at all. Our answer is that in minority-shareholder litigations, even when the shareholders are litigating with each other, it has become a sort of cut and dried custom to make the corporation a party. It will be noted that even in the many cases which we have cited on our main brief, where in stockholders' litigations the corporation has been held not to be an *indispensable* party, the pleader in each instance nevertheless had joined the corporation as a party.

Furthermore, under the New York State practice —and it will be remembered that this case was instituted in the State courts of New York—there was no reason for not joining the old corporation, as the decisions of the highest courts of the State of New York are flatly to the effect that in such a case service on the old corporation by publication would have been effective. (*Grant* v. *Green*, 59 Misc., 1, aff. under title of *Grant* v. *Cobre Grande Copper Co.*, 193 N. Y., 306).

Again, in the bill, allegations were made necessarily involving the actions and conduct of the old company. For instance, it was claimed that acting under the control of the defendant, the Southern Pacific Company, the old company had surrendered its defenses to the suit, and it was deemed proper and appropriate that the old company should be made a party and given a chance to answer these allegations. The claims made in the brief of our adversaries that the old company or its creditors might have some interest in the recovery in the present suit, are of themselves sufficient reason for making the old company a party to the present suit. However far-fetched these claims may be, it would be an advantage to have them litigated and disposed of now rather than after a final decree.

All of this, however, leads to the conclusion that the old company, while a proper party, was never in any sense an indispensable party to the suit.

We observe that considerable stress is laid in the

briefs of our adversaries upon the effect of this suit upon creditors of the old company. We fail to follow this argument at all. When the reorganization occurred in Texas, and the creditors who had claims subordinate to the mortgage creditors found themselves cut out, it may possibly be that they had rights which they might have enforced. So far as the record shows, none of them attempted to enforce any rights. They might have claimed that the reorganization scheme was in fraud of their rights, and for the purpose of cutting them off. They apparently did not do so. They all seem to have acquiesced in the fact that the foreclosure decree completely destroyed their claims against the old company.

But entirely distinct from the claims of creditors is the claim of the minority shareholders. It is probable that the creditors were properly cut off, and that the reorganization was not in fraud of unsecured creditors at all. It may be that the only people with whom any composition had to be made were the mortgage creditors. This would certainly seem to be so from the fact that the unsecured creditors took no steps whatever to assert their rights.

But granting that the creditors had rights or were wronged, and granting that in a controversy between the creditors and the whole body of stockholders some relief might have been obtained by the creditors, the fact remains that what has been done here is a thing which does not involve the rights of creditors at all. The majority stockholder has made a composition with the mortgage creditors out of which it has secured for itself the whole equity in the reorganized property. The fact that there were unsecured creditors, who are not litigating, and who are not asserting their rights does not in any way affect the equities between the majority shareholder, which abused its power, and secured a benefit for itself against its minority associates, and the latter.

Certainly the majority shareholder could not be

required, by any decree in this case, to turn back its profits to the old company for the purpose of discharging the claims of creditors. Those claims have been long since wiped out by foreclosure, and probably legitimately wiped out. The transfer of property which we seek to bring about is not a transfer from the Southern Pacific Company back to the old company and thence to the minority shareholders, but is a transfer which can be effected by a decree of the court directly from the Southern Pacific Company to the minority shareholders, and all parties interested are in court.

Suppose that the mortgage creditors, finding their suits to foreclose at a stand-still, and desiring to bring about a consent decree, had offered the Southern Pacific Company a payment of $10,000,000 in money, instead of $10,000,000 in stock, to induce the Southern Pacific Company to have the defenses of the old Railway Company withdrawn. Suppose that the Southern Pacific Company had accepted the payment, and had through its power over the old company, and its ownership of a majority of the stock, carried out its bargain and had the defenses withdrawn. Suppose that it should now appear that the Southern Pacific Company held the fund of $10,000,000, and the minority shareholders were claiming that it was money realized through the ownership of the majority of the stock in the old company, and the control of that company, and that they, the minority shareholders, were entitled to share in this fund. Could there be any doubt that in such a litigation the case could proceed to judgment, unembarrassed by the absence of the old company, and without bringing in any creditor of the old company?

The rule as to parties whose presence may be dispensed with under equity rule No. 47 is stated in *Waterman* vs. *Canal Louisiana Bank Company*, 215 U. S., 33, at page 44:

> "The relation of an indispensable party to a suit must be such that no decree can be en-

tered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party (1 Street's Fed. Equity Prac., 519).

"If the court can do justice to the parties before it without injuring absent persons, it will do so and shape its relief in such a manner as to preserve the rights of the persons not before the court."

An effort is made in the brief of our adversaries to maintain the proposition that in the state court complete jurisdiction by publication could not have been obtained. Cases are cited upholding the well-known rule that service by publication is only good to the extent of property of the absent defendant found or attached within the jurisdiction of the court.

In making this argument our adversaries overlook the fact, that, supposing the old company to be an indispensable party, there would at the end of this litigation be found within the jurisdiction of the court the amount of money or stock which the Southern Pacific Company would be forced to pay to a receiver or to somebody representing the minority shareholders. They overlook the fact that the property which this suit seeks to reach is in the possession of one of the defendants, which has been served with process in this action. They further overlook the fact that in the present suit no claim whatever is made against the old company, and that even on their theory that the money recovered would have to pass through the old company, the suit is one for the benefit of the old company, and not a suit against it. And lastly, they cannot answer our statement made in our main brief, which we reiterate, that it has been flatly decided by the Court of Appeals of New York in a stockholders' suit, indistinguishable in principle from the present one, that service on a foreign corporation

of which the parties are stockholders may be made by publication (*Grant* v. *Cobre Copper Co.*, 193 N. Y., 306, affirming *Grant* v. *Green*, 59 Misc., 1).

The Question of Jurisdiction.

The final decree and the order allowing the appeal, as well as the certificate herein, show clearly that the only question before the Circuit Court, and the only one that the Trial Judge had in mind, was whether or not the Court had jurisdiction. As there is nothing in any other part of the record to contradict this clear statement that the question before the lower court was one of its jurisdiction as a Federal Court, this conclusively shows what the judge below had in his mind—what it was that actuated him in reaching the decision we seek to review. He thought he was deciding a question of jurisdiction, and said he was.

In *Scully* vs. *Bird*, 209 U. S., 481, the Court held that the ground of the action of a Federal Circuit Court in dismissing a bill, as recited in the certificate, will be accepted by the Supreme Court on appeal where a different course requires an assumption of inconsistency between the lower court's opinion and the order of dismissal and certificate. In that case the record was clear, as it is in the case at bar, that the court below dismissed the bill for want of jurisdiction. But from its opinion it was clear that the Trial Judge in that case confused the jurisdiction of the court as a Federal Court with the court as a Court of Equity, as he said in his opinion, as stated by this court at page 484:

> " . . . it is clear that the case of *Arbuckle* vs. *Blackburn*, 113 Fed., 616, *is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. . . . That case is conclusive that this court has no jurisdiction to entertain a suit of this nature*, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso*, is one of a dismissal of the bill for want of jurisdiction." (Italics ours.)

This court said at page 485:

> "And it is urged that such was the reason given by the court in its opinion and order dismissing the bill, and that, as the decision of the court was right, it should not be reversed because the reason given for it in the certificate was not the correct reason. *But we cannot assume that there is inconsistency between the opinion and order of the court and its certificate. We, therefore, accept the latter as expressing the ground of the court's action.*" (Italics ours.)

The court then went on to consider the case and reversed the decree dismissing the bill for lack of jurisdiction.

In *Wetmore* vs. *Rymer*, 169 U. S., 115, the court said:

> "These provisions of the several statutes plainly disclose the intent of Congress that a party whose suit has been dismissed by a circuit court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the circuit courts in such cases is subject to revision."

There can be no question that the case at bar falls directly within these and many other similar authorities.

The Appellees in their brief claim that the court below did not dismiss our bill for lack of the jurisdiction referred to in Section 5 of the Act of March 3rd, 1891, Chapter 517, and many cases are cited to show that this court will only consider such appeals when they involve the jurisdiction of the Circuit Court as a Federal court. This, of course, is so, and there was never any doubt in the court below, either in the minds of counsel or in the mind of the Judge who decided the case, that the only jurisdictional question that was in issue was that of the jurisdiction of the circuit court as a Federal court. The bill was not dismissed for lack of equity or any

of the other reasons given in the cases cited by the Appellees, where this court dismissed the appeals because they did not involve the jurisdiction of the court below as a Federal court.

This court, in case the certificate and other parts of the record are contradictory, can examine the opinion to find out whether the court below dismissed the bill for lack of jurisdiction.

Courtney vs. *Pradt*, 196 U. S., 89.
Loeb vs. *Columbia Township*, 179 U. S., 472.

As we have shown, this hardly seems necessary, as the whole record shows that the appeal is taken to this court, because the question of jurisdiction of the circuit court was involved, and as shown in *Scully* vs. *Bird* (*supra*), even if the opinion contradicted this, it would not be enough to warrant the court in dismissing the appeal, unless the record itself was contradictory.

In this case, however, the opinion shows, as clearly as does the record, that the only question in the mind of the judge below was whether or not the circuit court had jurisdiction as a Federal court. At page 71 of the record the court states in his opinion that:

> ". . . the defendants have moved to dismiss the entire action *upon the ground of lack of jurisdiction*, while the plaintiff has asked that if the court does not retain jurisdiction, the action be now remanded to the State Court . . . It is apparent that the purpose of the various parties is to settle *the question of jurisdiction* and determine the forum (if any) in which this suit can be brought before a discussion of the merits of the case is attempted. . . . And if the *Circuit Court of the United States* for this district *has no jurisdiction*, and if the action be dismissed, a determination of the case upon its merits is plainly unnecessary; while, if the action should be remanded to the State Court a determination upon the merits there should

> not be embarassed by expressions of opinion of this court about what would be its decision if the case was before it." (Italics ours.)

This clearly shows that the only question in the court's mind was, whether the case should be remanded to the State Court or dismissed because the Federal court as a Federal court *had no jurisdiction.* If he were about to dismiss the case for lack of equity or for lack of jurisdiction in the court, simply as a court, he would not consider remanding it.

The court then proceeds to discuss Section 737, R. S., and Equity Rule 47 in order to determine whether or not the circuit court has jurisdiction to proceed with the action under the Federal Statutes as a Federal court, not as a court of equity.

The Court then says at page 75:

> "*It is similar to a motion to dismiss* by a defendant who has appeared specially and removed the case upon the ground that *the service of the parties has not been of such nature as to allow the action to be maintained in the Circuit Court of the United States under the provisions of section 3 of the act.*" (Italics ours.)

This, again, shows that the court below considered and decided this case simply as a question of the jurisdiction of that court as a Federal court, expressly stating that it considered the plea to its jurisdiction similar to a motion to dismiss "upon the ground that the service of the parties has not been of such a nature as to allow the action to be maintained in the Circuit Court," thus indicating, beyond any possibility of dispute, that the case was treated by the court below solely as one of Federal jurisdiction.

After determining that the Railway Company was an indispensable party, the only question discussed in the opinion was whether to remand or dismiss, which would not have been done if the judge

had had in mind merely the jurisdiction of this court as a court of equity, for, of course, if the case was one that could not be entertained by a court of equity and dismissed on that ground, there would be no question of remanding it.

Again at page 79 he says:

> "The question is very similar to that raised in cases where service of the parties has been obtained by methods which will not stand the test of the United States court rules and decisions."

These cases, of course, can involve no question of jurisdiction, except the jurisdiction of the Federal court as a Federal court.

There are no cases cited in the two briefs of the appellees which, in any way, overrule or modify *Scully* vs. *Bird*, or *Wetmore* vs. *Rymer* (*supra*). Mr. McILVAINE, in his brief, at page 4, claims that if it appears from the record that the jurisdiction of the court below is not in issue, that this court should dismiss the appeal, and cites *Fore River Ship Building Co.* vs. *Hagg* to show that this court is not precluded by the statement of the certificate from determining for itself whether the jurisdiction of the court below, as a Federal court, was in issue.

In that case the Circuit Court clearly had jurisdiction of the cause of action and of all the parties in an accident case, and the plaintiff obtained a verdict, whereupon the defendant appealed to the Supreme Court on the ground that the Employers' Liability Act, under which the suit was brought, was penal in its nature, and that the action could not therefore be maintained in this Country by the plaintiff, who was a citizen of Sweden, without proof that Sweden allowed our citizens to bring similar actions in Sweden.

This court held that there was jurisdiction in the Circuit Court, as the plaintiff was a citizen of Sweden, and the defendant a corporation of Massachusetts, and that the court below had jurisdiction

to decide all questions properly before it, "including the one whether, under the applicable principles of law, a court of another sovereignty would enforce a cause based upon the Massachusetts statute," and the determination of that question did not involve the jurisdiction of the Circuit Court as a Federal Court.

It was therefore apparent, from the record in that case, that there could not be any question involving Federal jurisdiction, and the certificate itself shows, on its face, that this was so, for the question certified was, "Whether or not the statute under which the plaintiff's action was brought, was of such a penal character that the Circuit Court did not have jurisdiction of said action". As the Court said, this could not present a question of Federal jurisdiction, whereas, in the case at bar, not only the certificate, but every statement in the record shows that the jurisdiction of the Circuit Court as a Federal court was involved.

The argument and cases cited by Mr. VAN BRUNT on pages 16, 17, 18, 19 and 20 of his brief are not in any way inconsistent with our position.

At page 21 of Mr. VAN BRUNT'S brief the two cases cited under Point III., to the effect that this court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below, as a Federal Court, was not in issue, are not in point. *Nichols Lumber Co.* vs. *Francon* merely holds that the record, as well as the certificate, should show that the question of jurisdiction is involved.

In *Donnell* vs. *Illinois Railroad Co.*, the certificate itself shows that a demurrer had been sustained, and that the plaintiff declined to plead further and that therefore a judgment of dismissal was entered, and as the court said, the only question decided by the demurrer was that the bill "did not state a cause of action." There is, of course, nothing of the sort in the case at bar.

Point IV of Mr. VAN BRUNT'S brief, beginning at page 22, is based on the concession that the court below did have jurisdiction of the case. If this is so, and if the court dismissed it for lack of jurisdiction, of course the decree must be reversed, as the only question to be considered on this appeal is the question of jurisdiction.

The cases cited at page 28 of the same brief do not in any way show that this appeal should be dismissed, as appeals in the cases there cited were dismissed on grounds that do not exist in the case at bar.

At page 31 of Mr. VAN BRUNT'S brief he says that the present case cannot be distinguished from the decision of this court in *Courtney* vs. *Pradt*, 196 U. S., 89. That case is entirely different from the case at bar. There the appeal was from a judgment of the Circuit Court dismissing, for want of jurisdiction *in the State Court*, a cause which had been removed to the Circuit Court from the State Court. No certificate of the question of jurisdiction was applied for or granted, but an appeal was allowed to this court, which was argued together with the motion to dismiss. There was, therefore, no certificate to show just what the grounds were upon which the court below dismissed the case, but it certainly was clear that the dismissal was not upon the ground of lack of jurisdiction of the Circuit Court itself to entertain the suit. The case was therefore not appealable to this court.

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